DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

MAY 0 8 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144

To: The Commission

REPLY TO NEXTEL'S OPPOSITION TO PETITION FOR RECONSIDERATION

Introduction

1. Chadmoore Wireless Group, Inc. ("Chadmoore") pursuant to Section 1.429(g) of the Commission's rules, respectfully submits this Reply to Nextel Communications, Inc.'s ("Nextel") Opposition to Chadmoore's Petition for Reconsideration of the *Remand Order*[1] in the above referenced proceeding.

2. Chadmoore seeks Reconsideration of the *Remand Order* because the Commission failed to treat similarly situated SMR licensees similarly in violation of Section 332(c) of the Communications Act (the "Act"). Nextel claims that Chadmoore is attempting to reopen the denial in 1997 of certain requests for wide-area extended implementation ("EI") authority, that the request comes too late, and that Chadmoore has no standing. On the contrary, Chadmoore's petition is addressed to the *Remand Order*, which is a current proceeding; so Chadmoore is not late, and it is Nextel's arguments that are not on point. Nextel's standing argument also fails, because it is dependent on Nextel's mischaracterization of Chadmoore's petition.

Chadmoore Seeks Reconsideration of the Commission's *Remand Order*, Not the May 1997 Order Regarding Requests for Extended Implementation Authority.

3. Chadmoore is not seeking reconsideration of the Commission's May 1997 decision regarding the Roberts Group's request for EI authority. Rather, Chadmoore requests that the

---

[1] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Remand*, PR Docket No. 93-144 (Dec. 23, 1999) ("*Remand Order*").

No. of Copies rec'd 0+4
List ABCDE

Commission reconsider whether it has fully complied with the Court's remand and Section 332 of the Act. The Court decision and the Commission's implementation thereof are new developments that affect Chadmoore and that Chadmoore is entitled to challenge.

4. In 1995, the Commission released the *800 MHz SMR First Report and Order*, adopting build-out rules that treated Economic Area ("EA") licensees and incumbent wide-area[2] licensees differently, affording EA licensees relief by allowing them to keep their licenses if they achieved Interim Coverage Requirements, but denying similar relief to incumbent wide-area licensees who provided similar services to the public. During the time the rule making was in progress, the Roberts Group Licensees were within their construction periods. In the 1997 *800 MHz SMR Reconsideration Order*,[3] the Commission "maintain[ed] the requirement that incumbent licensees who had received [EI] authorizations must construct and operate all sites at all frequencies within a certain period or lose the unconstructed frequencies."[4]

5. On appeal, the U.S. Court of Appeals for the D.C. Circuit Court held that "the Commission had failed to adequately explain its disparate treatment of incumbent and new licensees..."[5] -- that the Commission did not adequately explain why it had relaxed the build-out rules on EA licensees but it did not afford the same regulatory treatment to other wide-area

---

[2] Chadmoore's references to wide-area networks refers to a large group of centrally managed licenses used to provide similar services, which is how the term was generally understood by the public and the Commission staff at the time of the Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, First Report and Order, 11 FCC Rcd 1463 (1995) ("*800 MHz SMR First Report and Order*").

[3] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 12 FCC Rcd 9972 (1997) ("*800 MHz SMR Reconsideration Order*").

[4] *Remand Order* at ¶ 1.

[5] *Fresno Mobile Radio, Inc. et al. v. Federal Communications Commission and the United States of America*, 265 F.3d 965 (D.C. Cir. Feb. 5, 1999) ("*Fresno Decision*").

incumbent licensees as required by Section 332(c) of the Act. 47 U.S.C. § 332(c). The Court thus remanded the *800 MHz SMR Reconsideration Order* for consideration of whether wide-area incumbent SMR licensees are sufficiently different from EA, cellular, and PCS licensees to warrant disparate regulatory treatment under Section 332(c).

6. On remand, the Commission found that "SMR licensees granted extended implementation authority are sufficiently similar to EA licensees that they should have similar flexibility with respect to construction requirements."[6] However, the Commission failed to explain why only incumbents with EI authority still in effect at the time of the *Fresno Decision*, and not other incumbents providing similar services to the public whose shortened EI periods had previously expired, were sufficiently similar to EA licensees to warrant similar treatment. When it enacted Section 332(c), Congress directed the Commission to promulgate "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar services."[7] The Court directed the Commission to apply the statutory test, and that is what the Commission is legally obligated to do.

7. Chadmoore's point is that the Commission is still treating providers of similar services differently, because the distinction between licensees who earlier received EI authority which expired prior to the *Fresno Decision* and those whose EI authority was still in effect, bears no relevance to the statutory test of the types of services these licensees were providing at the time the Commission adopted the *800 MHz SMR Report and Order*. The services were substantially similar, so the Commission must correct the error it made in 1995 when it first promulgated rules that treated similarly situated licensees (*i.e.*, incumbent SMR service providers versus EA SMR service providers) differently. Similar treatment requires that Interim Coverage Requirements be applied to all similarly situated incumbents, which in turn requires reinstatement of those SMR licenses that

---

[6] *Remand Order* at ¶ 12.

[7] Pub. L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312 (1993) (emphasis supplied).

would have been constructed in a timely manner if they had been afforded the same relief the Commission afforded to the EA licensees (*i.e.*, Interim Coverage Requirements).[8]

Chadmoore's Arguments Prevail on the Merits.

8. Nextel's arguments on the merits all fail, because they are focused on the timeliness of a challenge to the denial of EI authority, which is a challenge Chadmoore is not making here. Chadmoore challenges the FCC's uneven and unlawful application of the Court's decision on remand, and that challenge has merit that Nextel has not even begun to refute. The Commission's decision to divide incumbent SMR licensees into two groups, affording relief only to those who were within their construction periods at the time of the *Fresno Decision*, ignores the statutory test, is not supported by the reasoning of the Court, does not pass scrutiny under *Chevron*,[9] is arbitrary and capricious,[10] and therefore must be reconsidered.

9. But for the FCC's failure to apply Interim Coverage Requirements to the Roberts Group licenses in 1995, the Roberts Group, in cooperation with Chadmoore, would have successfully constructed all of its systems and would be providing valuable dispatch services to many communities across the country, services for which there is now an unmet, pent-up demand. The

---

[8] Thus, it does not matter whether the Roberts Group is granted EI authority, which is why Chadmoore's petition is not an untimely attempt to undo an old Commission action. The Roberts Group is entitled to the same benefit of the Interim Coverage Requirements, regardless of whether EI authority was or was not granted, because its licenses were intended for the provision of similar services to those provided by others who received that benefit.

[9] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the Court as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[10] *See Petroleum Communications, Inc. v. F.C.C.*, 22 F.3rd 1164, 1172 (D.C. Cir. 1994) (it is arbitrary and capricious, within the meaning of 5 U.S.C. § 706(2)(A), for the Commission to treat, without adequate explanation, similarly-situated licensees differently).

fact that there may be some disruption of the expectations of the holders of subsequently granted licenses is not without precedent[11] and cannot justify a violation of Section 332(c) of the Act.

Standing Is Not Relevant to this Rule Making Proceeding

10. Nextel's challenge to Chadmoore's standing to file its petition is irrelevant, because this proceeding is a rule making, where anyone may participate. In the *Goodman/Chan* case, Court stated that "Section 1.106 of the Commission's rules expressly provides that [standing] 'does not govern' in 'notice and comment rule making proceedings.' *See also* 1 Kenneth Culp David & Richard J. Pierce, Jr., *Administrative Law Treatise*, §§ 6.7, 266 (3rd e.d. 1994) (agency rule making proceedings typically open to any interested member of the public.)"[12] The *Goodman/Chan* Court held that the case then before it was adjudicatory rather than a rule making, the Commission apparently intended that proceeding to be the same. In contrast, the instant proceeding bears a rule making docket number in the caption, arises on remand of an appeal of a rule making, includes a Regulatory Flexibility Act Analysis, and has otherwise been consistently treated as a rule making in all respects.[13] Thus, the issue of standing is irrelevant. Indeed, if this were not a rule making

---

[11] The Commission also cannot rely on any diminution of anticipated auction revenues, as Section 309(j)(7)(A) of the Act forbids crafting rules for the purpose of maximizing auction revenues. 47 U.S.C. § 309(j)(7)(A). In addition, the Commission has always had the ability to institute a proceeding to take action that would result in the modification of someone's license or even revoke that license at any time after grant "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." 47 U.S.C. § 312(a)(2). Furthermore, the Commission will modify or revoke a license if the license was issued as a result of a legal or administrative error by the FCC. *See In re Application of Bell Atlantic-Pennsylvania, Inc. for Authorization to Construct and Operate New Paging and Radiotelephone Service Facilities on 152.63 MHz at Reading, Pennsylvania*, Order, File No. 27245-CD-P/ML-94 (Pol. Rul. Br. August 16, 1999) (Grant of Bell Atlantic-Pennsylvania, Inc.'s authorization for new base station facility voided as its original application should not have been granted).

[12] *Daniel R. Goodman, Solely in his Capacity as Receiver, Chadmoore Wireless Group, Inc., and SMR Services, Inc., et al., v. Federal Communications Commission and United States of America*, 182 F.3d 987 (D.C.Cir. 1999).

[13] The fact that the outcome of the rule making may affect the status of specific licenses does not change the character of the proceeding. Many rule makings affect the validity of groups or classes of licenses. It is the Commission's arbitrary and unlawful delineation of categories that is issue here, not which of the categories applies to the Roberts or any other specific licensee.

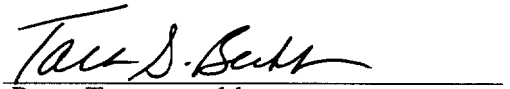
proceeding, Nextel's Opposition would be more than two months late and would not be considered by the Commission.[14]

Conclusion

11. In light of the foregoing, it is respectfully requested that the Commission reconsider the *Remand Order*, eliminate the distinction between licenses granted EI authority and other licenses where similar services to the public are involved, and afford all incumbent wide-area SMR licensees holding EI authority and that were within their construction periods on December 15, 1995, the same additional time to construct their facilities.

Respectfully submitted,

Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W.
Suite 200
Washington, DC 20036-3101
Tel. 202-728-0400
Fax 202-728-0354



Peter Tannenwald
Tara S. Becht

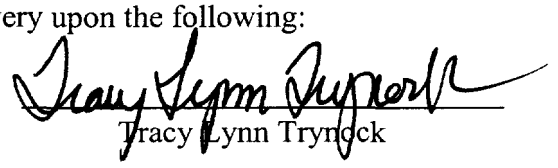
Counsel for Chadmoore Wireless Group, Inc.

May 8, 2000

[14] Section 1.106(h) of the Commission's rules provides that "oppositions to a petition for reconsideration shall be filed within 10 days after the petition is filed . . ." 47 C.F.R. § 1.106(h). Therefore, if this were a non-rule making proceeding, Nextel's opposition would have been due on February 8, 2000, ten days after Chadmoore's Petition for Reconsideration was filed, plus three additional days, excluding holidays, as the petition was served on Nextel by mail. Nextel filed its Opposition with the Commission on April 24, 2000, eleven weeks after it would have been due under Section 1.106.

CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, hereby certify that on this 8th day of May, 2000, a copy of the foregoing "Reply to Nextel's Opposition to Petition for Reconsideration" has been served by first-class United States mail, postage prepaid, or by hand delivery upon the following:



Tracy Lynn Trynock

Chairman William E. Kennard*
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201H
Washington, D.C. 20554

Commissioner Michael K. Powell*
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204C
Washington, D.C. 20554

Commissioner Furchtgott-Roth*
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302C
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115H
Washington, D.C. 20554

Commissioner Tristani*
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302C
Washington, D.C. 20554

Mr. Don Johnson*
Policy and Rules Branch
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W.
Room 4A-207
Washington, D.C. 20554

Thomas Sugrue, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C207
Washington, D.C. 20554

Mr. Scott A. Mackoul*
Policy and Rules Branch
Commercial Wireless Division
Federal Communications Commission
445 12th Street, S.W.
Room 4A-207
Washington, D.C. 20554

Frederick M. Joyce, Esq.
Joyce and Jacobs
Attorneys at Law, L.L.P.
1019 19th Street, N.W.
14th Floor
Washington, D.C. 20036

Robert H. Schwaniger, Esq.
Schwaniger and Associates
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006-1203

Thomas P. Steindler, Esq.
McDermott Will & Emory
600 13th Street, N.W.
Washington, D.C. 20005

Robert S. Foosaner, Esq.
Nextel Communications, Inc.
1450 G Street, N.W.
Suite 425
Washington, D.C. 20005

***DENOTES HAND DELIVERY**